

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 218 OF 2020

In the Matter of Articles 1, 2, 3, 10, 19, 20(1) (4), 21, 22, 24, 25, 26(1), 28, 29,
35, 47, 165, 232(1), 258 and 259 of the Constitution

and

In the Matter of Section 4 and 9 of the Access to Information Act, 2016

and

In the Matter of Section 5, 6 and 10 of the Health Act, 2017

and

In the Matter of Section 3 and 4 of the Fair Administrative Action Act, 2015.

BETWEEN

ERICK OKIOMA1ST PETITIONER
ESTHER NELIMA 2ND PETITIONER
CHRIS OWALLA 3RD PETITIONER
CM..... 4TH PETITIONER
FA..... 5TH PETITIONER
KB 6TH PETITIONER
MO 7TH PETITIONER
EL..... 8TH PETITIONER
KATIBA INSTITUTE9TH PETITIONER
KENYA LEGAL AND ETHICAL ISSUES NETWORK
ON HIV/AIDS (KELIN)10TH PETITIONER
THE KENYA SECTION OF THE INTERNATIONAL
COMMISSION OF JURISTS (ICJ KENYA).....11TH PETITIONER
TRANSPARENCY INTERNATIONAL KENYA.....12TH PETITIONER
ACHIENG ORERO.....13TH PETITIONER

(9th to 13th Petitioners suing on behalf of health and human rights civil society
and non-governmental organisations)

VERSUS

MUTAHI KAGWE, CABINET SECRETARY
FOR HEALTH.....1st RESPONDENT

PATRICK AMOTH, AG DIRECTOR GENERAL,
MINISTRY OF HEALTH.....2nd RESPONDENT

CORNEL RASANGA, GOVERNOR OF
SIAYA COUNTY 3rd RESPONDENT

COUNCIL OF GOVERNORS..... 4th RESPONDENT

FRED OKENGO MATIANGI, CS INTERIOR AND
COORDINATION OF NATIONAL
GOVERNMENT..... 5th RESPONDENT

HILARY NZIOKI MUTYAMBAI, INSPECTOR GENERAL
OF THE POLICE, KENYA 6th RESPONDENT

JOSEPH WAKABA MUCHERU, CABINET
SECRETARY FOR INFORMATION
AND COMMUNICATIONS 7th RESPONDENT

THE COMMISSION ON ADMINISTRATIVE
JUSTICE 8th RESPONDENT

DANIEL YUMBYA, CHIEF EXECUTIVE OFFICER,
KENYA MEDICAL PRACTITIONERS' AND
DENTISTS COUNCIL 9th RESPONDENT

AND

KENYA NATIONAL COMMISSION ON
HUMAN RIGHTS (KNCHR)1ST INTERESTED PARTY

10th PETITIONER SUPPLEMENTARY AFFIDAVIT

I, ALLAN ACHESA MALECHE, of P.O.BOX 112 – 00202, Nairobi, a male adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya, and the Executive Director of the 10th Petitioner herein whose address for purposes of Petition is care of KENYA LEGAL AND ETHICAL

ISSUES NETWORK ON HIV AND AIDS, Kuwinda Lane, off Langata Road, Karen C, P.O. Box 112 – 00202, Nairobi, do hereby make a solemn oath and state as follows;

1. **THAT** I am an advocate of the High Court of Kenya and the Executive Director of the Kenya Legal and Ethical Issues Network of HIV and AIDS (KELIN) thus competent to swear this Affidavit.
2. **THAT** I have the authority of the Board of Directors to swear this Affidavit on behalf of KELIN herein.
3. **THAT** I have the authority to swear this Affidavit on behalf of the 1st- 8th Petitioners, the 12th and 13th Petitioners.
4. **THAT** I have read the contents of the replying affidavits sworn by the 3rd Respondent, 4th Respondent and the 9th Respondent.
5. **THAT** I swear this affidavit in opposition and response to the replying affidavits by the 3rd Respondent, 4th Respondent and the 9th Respondent and wish to state as follows.

REPLY TO THE 3RD RESPONDENT

6. **THAT** anything not expressly denied in the Replying Affidavit is believed to have been admitted.

7. THAT paragraph one of the Replying Affidavit is admitted.
8. THAT paragraph two of the Replying Affidavit is not within the knowledge of this deponent.
9. THAT paragraphs four and five of the Replying Affidavit are denied and this is a matter that ought to be determined before this Honourable Court.
10. THAT in response to paragraph six the 3rd Respondent has not provided any evidence before this Court that the information sought was subject to an enquiry by a taskforce which has since been halted.
11. THAT in response to paragraph seven the 3rd Respondent has not provided any evidence before this Court that the information sought by the Petitioners was easily accessible online.
12. THAT in response to paragraph eight, it is for this Honourable Court to determine the merits of this Petition and this is not an issue for the 3rd Respondent to address in his affidavit.
13. THAT in response to paragraph nine, the Petitioners deny that it is in the interest of justice to dismiss this Petition as it does not lack merit and that costs should be awarded against the Petitioners as this shall be determined by this Honourable Court.
14. THAT paragraph nine is admitted.

REPLY TO THE 4TH RESPONDENT

15. THAT anything not expressly denied in the Replying Affidavit is believed to have been admitted.

16. THAT paragraph one of the Replying Affidavit is admitted.

17. THAT paragraph two of the Replying Affidavit is not within the knowledge of the deponent.

18. THAT paragraphs four, five, six and seven of the Replying Affidavit are admitted.

19. THAT in response to paragraph eight, the 4th Respondent has not provided any evidence before this honourable court that a large majority of its employees were working from home with restricted access to the office. Additionally, the 4th Respondent has not provided any evidence that the information sought was not readily available due to the fact that operations were not optimal.

20. THAT paragraph nine and ten of the Replying Affidavit are admitted.

21. THAT paragraph 11 is admitted save for the fact that the press statements attached as evidence were not made weekly.

22. THAT paragraph 12 of the Replying Affidavit is denied. That on 27th April 2020 the 1st-3rd, 10th and 12th Petitioners drafted a letter on their own behalf and on behalf of the public requesting information on the use of

quarantine as a form of punishment and criminalisation of the COVID-19 Response (Annexure “AM-008” in the Affidavit in support of the Petition filed on 2 July 2020 sworn by Allan Maleche). That in that letter the Petitioners requested that the 4th Respondent urgently provide the following information:

- a. The number of people currently in quarantine in each of their respective counties.
- b. The number of people who have been tested in the various quarantine facilities in the counties.
- c. The testing schedule of the people in county quarantine.
- d. The number of people in quarantine because of breach of curfew and other COVID-19 rules.
- e. The number of people in quarantine because they are close contacts of COVID-19 patients.
- f. The welfare measures taken to ensure the physical and mental health and well-being of the persons in quarantine.

23. **THAT** the allegation in paragraph 12 that the information within the press statements covered the requests of the Petitioners is inaccurate and the only information that was available in these statements was the number of people held in quarantine, and even that data was not disaggregated to indicate the numbers in each respective county as requested by the Petitioners.

24. **THAT** the information was urgently sought and was neither responded to nor even an acknowledgement of receipt provided, when requested on 27th April 2020, and as at the date of filing the Petition (2nd July 2020) a response had

not been received from the 4th Respondent and has still not been received at the date of swearing this affidavit despite it being urgently sought.

25. **THAT** publicizing information through a press statement does not negate the duty to provide information directly sought from the 4th Respondent. This is bolstered in the 4th Respondent's own statement of 8th July 2020 where the H.E. Hon. FCPA Wycliffe Oparanya admitted that: "*There has been a challenge of dissemination of information to the public on COVID-19*" (Council of Governors: Press Statement on Preparedness of County Governments on COVID-19 – Week 18 Annexure "JM-K2" in the Replying Affidavit sworn by Jacqueline Mogeni on 18th January 2020).
26. **THAT** the 4th Respondent as a State Organ has an obligation to provide information sought from it and failing to do so for almost 11 months is a violation of the Petitioners' Rights.
27. **THAT** paragraphs 13 and 14 are issues before this Honourable Court for determination and not for the 4th Respondent to address in its affidavit.
28. **THAT** paragraph 15 is not within the knowledge of this deponent.
29. **THAT** paragraph 16 is an issue before this Honourable Court for determination and not for the 4th Respondent to address in its affidavit.
30. **THAT** paragraph 17 is admitted.

REPLY TO THE 9TH RESPONDENT

31. THAT anything not expressly denied in the Replying Affidavit is believed to have been admitted.
32. THAT paragraph one and two of the Replying are admitted.
33. THAT paragraph three and four of the Replying Affidavit is not within the knowledge of this deponent.
34. THAT paragraph five, six and seven of the Replying are admitted.
35. THAT paragraph eight is admitted save for the fact that it is not within this deponent's knowledge if the 9th Respondent has perused the letters.
36. THAT paragraph nine is denied. The 9th Respondent did not provide accurate and timeous information and the evidence relied is not available to the 'general public' as the Petitioners sought to access it using the same uniform resource locator (URL) and received an error message (Annexed and marked to "AAM-001" is a screenshot from the website of the Kenya Medical Practitioners and Dentists Council).
37. THAT it is further denied that publication on a website renders information available to the general public because the individual internet use statistics in Kenya in 2019 was at 22.6% of the general population as evidenced by this

data from the World Bank, less than a quarter of our country. (Annexed and marked to “AAM-002”)

38. THAT in response to paragraph 10, the 9th Respondent has not provided evidence on how this Checklist was published and if it was at all published and publicized. In addition, the Checklist (Annex “DY-2” of the Replying Affidavit sworn by Daniel Yumbya on 6th January 2021) has not been dated and the date of its development has not been provided. Finally, the 9th Respondents has failed to demonstrate through evidence before this Court if it made any attempts to make public the information in that Checklist.
39. THAT the 9th Respondent has annexed the checklist to his Replying Affidavit (Annex “DY-2” of the Replying Affidavit sworn by Daniel Yumbya on 6th January 2021) but failed to respond to a request for the same information sought on 27th April 2020.
40. THAT paragraph 11 is denied and the 9th Respondent has not provided any evidence on how the Quarantine List (Annexure “DY-3” of the Replying Affidavit sworn by Daniel Yumbya on 6th January 2021) was published and if at all it was published and publicized.
41. THAT in addition the Quarantine List provided states “*This list is at 2:05pm, 24th March, 2020 and shall be updated again at 4.00pm*”. The Petitioners sought the following: “*The list of all places certified as quarantines facilities both at the national and county level as from 23rd March 2020 to date.*” This request was dated 27th April 2020 (Annexure “AM-008” in the Affidavit in support of the Petition filed on 2nd July 2020 sworn by Allan Maleche) and a

list dated 24th March 2020 is not evidence of a response to a request that sought information up to 27th April 2020.

42. **THAT** the information was urgently sought and was neither responded to nor even an acknowledgement, when requested on 27th April 2020, and as at the date of filing the Petition (2nd July 2020) a response had not been received from the 9th Respondent and has still not been received at the date of swearing this affidavit despite it being urgently sought.
43. **THAT** the Kenya Medical Practitioners' and Dentists Council as an Agent of the State has an obligation to provide information sought from it and failing to do so for almost 11 months is a violation of the Petitioners' Rights.
44. **THAT** paragraphs 12, 13, 14 and 15 are not within the knowledge of this deponent.
45. **THAT** paragraphs 16 and 17 raise a question of law and is an issue to be determined before this Honourable Court and not for the 9th Respondent to address in his affidavit.
46. **THAT** paragraph 18 is denied and the 9th Respondent has not provided evidence to show that the information sought was within the public domain (please see paragraphs 36-40 of this Supplementary Affidavit). It is further denied that the 9th Respondent can willfully ignore a request for information brought by Citizens of Kenya because he feels it is unnecessary to provide the information.

47. THAT paragraph 19 and 20 are issues before this Honourable Court for determination and not for the 9th Respondent to address in his affidavit.
48. THAT paragraph 21 is admitted.
49. THAT what is deponed to herein is true to the best of my knowledge, information and belief, save for information whereof sources of information have been disclosed.

SWORN by the said)
ALLAN ACHESA MALECHE)



) _____
) **DEPONENT**

at NAIROBI this 4th day)
of March 2021)

BEFORE ME:)
'J.M. NJENGO')
ADVOCATE)
COMMISSIONER FOR OATHS)
& NOTARY PUBLIC)
P.O. Box 2964 - 00200, NAIROBI)

COMMISSIONER FOR OATHS)

DRAWN & FILED BY: -

Nerima Were, Advocate,
C/O KELIN
Kuwinda Lane, off Langata Road, Karen C
P O Box 112 - 00202 KNH Nairobi
Mobile: +254 751 292 520
E-mail: nwere@kelinkenya.org

TO BE SERVED UPON: -

The Attorney General of the Republic of Kenya
State Law Office
Harambee Avenue
P.O. Box 40112 – 00100,
Nairobi.

Osiemo, Wanyonyi & Company Advocates,
Shankadass House,
3rd Floor, Suite 304,
P.O. Box 79136-00200,
Nairobi, Kenya

The Commission on Administrative Justice
2nd Floor, West End Towers
Opposite Aga Khan High School off Waiyaki Way – Westlands
P.O. Box 20414 – 00200
Nairobi, Kenya.

Eugine N. Lawi
Council of Governors
Delta Corner, 2nd Floor, Opp PWC Chiromo Road, Off Waiyaki Way
P.O. Box 40401 – 00100,
Nairobi, Kenya

Muriu, Mungai and Co Advocates
MMC Arches
Spring Valley Crescent,
Off Peponi Road, Westlands,
P.O. Box 76352-00200
Nairobi, Kenya.

Kenya National Commission On Human Rights (KNCHR)
1st Floor, CVS Plaza, Lenana Road
P.O. Box 74359-00200
Nairobi, Kenya.

404
Home :: Error 404

This is Exhibit marked AAKM-001
referred to in the Annexed affidavit/Declaration
of Allan Acheson Isakiche
Sworn/Declared before me on this 4th
day of March 2021
at Nairobi in the Republic of Kenya
[Signature]
Commissioner for Oaths

3 | kmpdc.go.ke/resources/Government_Facilities.pdf

... [My LexisNexis - It's...](#) [2015 List of School...](#) [Directions](#) [The Amazing Ank...](#) [Pathologies of Po...](#) [Limitations on hu...](#)

Sham, Nairobi [+254-720771478](tel:+254-720771478) | [+254-738504112](tel:+254-738504112) | [+254-202711478](tel:+254-202711478)

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KATIBA INSTITUTE 9TH PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK
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THE KENYA SECTION OF THE INTERNATIONAL
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(9th to 13th Petitioners suing on behalf of health and human rights civil society
and non-governmental organisations)

VERSUS

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**PATRICK AMOTH, AG DIRECTOR GENERAL,
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JUSTICE 8th RESPONDENT**

**DANIEL YUMBYA, CHIEF EXECUTIVE OFFICER,
KENYA MEDICAL PRACTITIONERS' AND
DENTISTS COUNCIL 9th RESPONDENT**

AND

**KENYA NATIONAL COMMISSION ON
HUMAN RIGHTS (KNCHR)1ST INTERESTED PARTY**

CERTIFICATE OF AUTHENTICITY

(Under Sections 78 and 106 B of the Evidence Act Cap. 80 of the Laws of Kenya)

I, **NERIMA AKINYI WERE**, of **P.O.BOX 112 – 00202, Nairobi**, a male adult Kenyan of sound mind residing and working for gain in Nairobi County within the Republic of Kenya, and the Deputy Executive Director of the 10th Petitioner herein whose address for purposes of Petition is care of **KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV AND AIDS**, Kuwinda Lane, off Langata

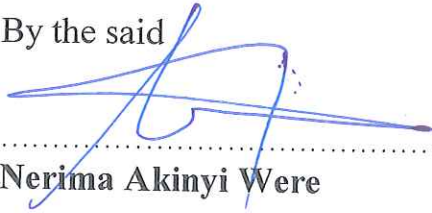
Road, Karen C, P.O. Box 112 – 00202, Nairobi, do hereby make a solemn oath and state as follows;

1. **THAT** I am an advocate of the High Court of Kenya and the Deputy Executive Director of the Kenya Legal and Ethical Issues Network of HIV and AIDS (KELIN) who has the joint conduct of this matter on behalf of the 1st – 8th, 10th, 12th and 13th Petitioners thus competent to swear this Affidavit.
2. **THAT** on 4 March 2021 while preparing an Affidavit by KELIN I used my laptop to take a screen shot from the Kenya Medical Practitioners and Dentists Council website under the tab of Resources at 4:30 PM.
3. **THAT** I have annexed this screenshot to the Supplementary Affidavit sworn by Allan Achesa Maleche affidavit sworn on 4 March 2021 Marked “AAM-001”
4. **THAT** I took the screen shot using my laptop (service tag/ serial number C02T856SFVH3) which was in good working condition and operated and performed the actions described above seamlessly and without any technical difficulties.
5. **THAT** at the time of my use, the laptop and printer which I used to access and print the information were both functioning correctly to the best of my knowledge.

6. THAT I therefore certify that the printed copies of the electronic documents I have produced before the court are authentic. I have also produced a certificate of authentication.

Certified at Nairobi this 4 day of March 2021.

By the said



.....
Nerima Akinyi Were

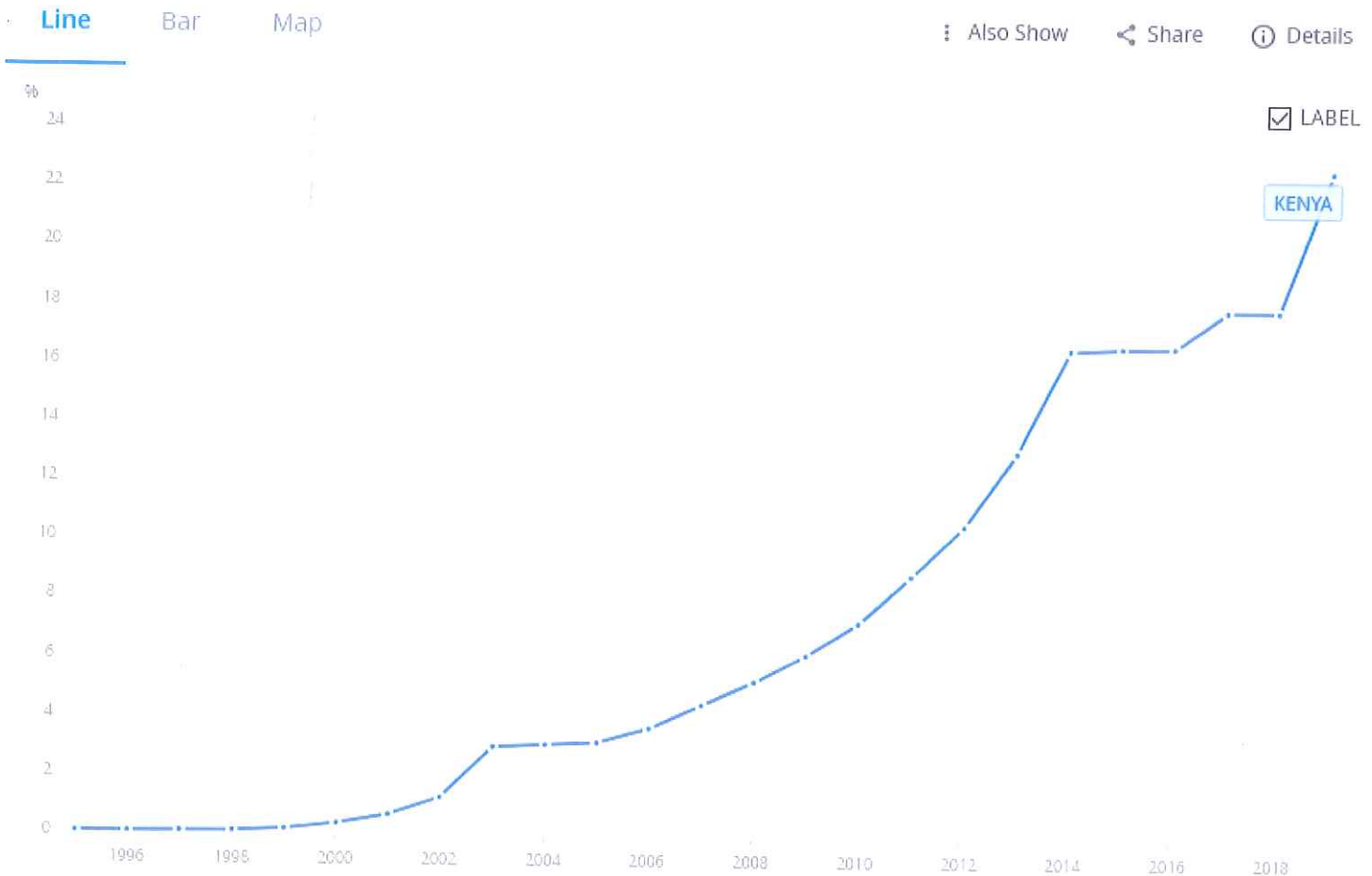
DRAWN AND FILED BY:

Dudley Ochiel, Advocate,
C/O Katiba Institute, 5 The Crescent off Parklands Road Westlands,
Mombasa Road,
P.O. Box 26586-001002
Nairobi
info@katibainstitute.org
Tel: 0708398870/0704594962

Individuals using the Internet (% of population) - Kenya

International Telecommunication Union (ITU) World Telecommunication/ICT Indicators Database

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1995 - 2019

Selected Countries and Economies

Country

Kenya

Most Recent Year

2019

Most Recent Value

23

This is Exhibit AAM-002
 referred to in
 of Alan Achesa Malech
 Sworn/Declared before me on 4th
 day of March 2019
 at Nairobi in the Republic of Kenya
 Commissioner for Oaths